

solicited comment on this issue (Notice ¶ 162). It has also been suggested that to prevent this, the Commission might impose customer and use restrictions that would presumably prohibit a carrier obtaining such interconnection from providing exchange access to itself.

Such restrictions would be unnecessary and anticompetitive. They would be unnecessary because, in our view, it would be quickly apparent if any interexchange carrier attempted to improperly use this section simply to evade the Commission's rules. The Commission, of course, could take appropriate action in that event.¹⁸

In any case, such restrictions would sweep far more broadly than necessary to deal with possible evasion of access charges due to ILECs. Moreover, such restrictions would likely exclude, or at least severely handicap, one of the most promising classes of new competitive entrants into the exchange services and access markets, i.e., the interexchange carriers, thereby starkly limiting the opportunity to bring much needed competition to the access market. This result finds no support in the statutory language or legislative history. Indeed, such a result would conflict with Congress' statutory desire to foster competition by

same result through a 'backdoor' -- i.e., by obtaining interconnections and unbundled elements ostensibly to provide local service in competition with an incumbent LEC pursuant to 251(c) and then using those arrangements to originate and terminate all its interexchange traffic."

¹⁸ Carriers providing exchange services have an obligation to provide dialing parity and exchange customers, of course, expect to obtain connectivity to all carriers especially for receiving calls or for calling "800" and other special access code services.

maximizing make/buy options for potential entrants.

2. Section 251(c)(3) Permits Interexchange Carriers Access To Unbundled Network Elements For Use In Providing Exchange Access.

Section 251(c)(3) imposes a duty upon incumbent LECs

"to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."

The interexchange carriers maintain that, regardless of the interpretation of section 251(c)(2), section 251(c)(3) clearly gives them the right to demand exchange access from the ILECs for any combination of network elements that they desire. The ILECs respond to this argument by asserting that sections 251(c)(2) and 251(c)(3) must be considered together and thus interexchange carriers that are not entitled to interconnection for the purpose of *receiving* exchange access may not claim access to unbundled network elements that would be provided through that interconnection.

The Department does not agree with the ILECs' contentions that the limitation in section 251(c)(2) also limits access to unbundled network elements under section 251(c)(3). Unlike section 251(c)(2), the language of section 251(c)(3) does not condition entitlement on interexchange carrier provision (and not just

receipt) of exchange access. Each provision should be interpreted in accord with the language used by Congress unless to do so would otherwise frustrate a clearly expressed congressional purpose. Here the language of section 251(c)(3) clearly authorizes interexchange carriers to purchase unbundled access to ILEC network elements, and applying the provision literally would promote, not frustrate, the statutory goals of promoting competitive entry. Accordingly, we interpret section 251(c)(3) to require ILECs to provide requesting carriers (including interexchange carriers) with access to unbundled elements without regard to the nature of the services or the jurisdiction of the services to be offered by the requesting carrier.

We note, however, that under the Commission's apparent assumptions, the practical significance of this interpretation may be limited. The Commission appears to assume, as do we, that in order to provide switched exchange access to a customer through the use of unbundled network elements, the interexchange carrier typically would assume control over the customer's loop which is used for both local calling and exchange access; thus the interexchange carrier would be "providing" local service. Notice ¶ 163.

The Commission identifies (Notice ¶ 84) the apparent distinction, drawn in the definition of "network element" in the 1996 Act, between the "facility or equipment used in the provision of a telecommunications service," and the service itself. Based on this distinction, the Commission appears to conclude that it would not be consistent with the meaning of network element for an interexchange carrier to be able to obtain an unbundled customer loop solely for the

occasions when it might be needed in connection with an interexchange service.¹⁹

If this analysis is correct, an interexchange carrier could not under section 251(c)(3) request access to a customer's loop for obtaining exchange access where the same loop was being used by another carrier to provide local exchange service. Thus, as a practical matter, an interexchange carrier would also have to become an exchange service provider in order to obtain access to the network elements needed to provide switched exchange access under section 251(c)(3).²⁰

¹⁹ Notice ¶ 164. This is certainly consistent with the industry practice at the time of enactment when unbundled loops were being used by competitive local exchange providers.

²⁰ While not necessarily compelled by the statutory language, such an interpretation would be consistent with the Act's method for pricing network elements. If an interexchange carrier were to be provided "shared access" to the loop (in order to receive exchange access from some other carrier's local exchange customer) some sort of separation of costs would seemingly be necessary in order to determine the price to the interexchange carrier for its use of the loop to originate or terminate interexchange calls. In fact, many interexchange carriers would presumably have to share the loop for the purpose of terminating calls since the customer would receive calls from customers using many carriers, not to mention the originating calls to 800, 900, and 500 numbers that might be carried by other than the customer's presubscribed carrier. The apparent need to institute such a separation procedure would impose difficult pricing problems since the loop is considered to be a non traffic-sensitive facility. It is not clear how a flat-rate could be apportioned among the numerous potential shared users of the loop, and imposing a usage-sensitive charge for its use in providing interexchange services would seem to be both inconsistent with the Act's emphasis on true economic costs and to create economic inefficiencies analogous to those the Commission is attempting to remove from the current access charge regime.

B. The Commission Should Not Restrict The Ability Of Requesting Carriers To Obtain, Under Section 251(c)(3), A Package Of All Network Elements Needed To Provide A Complete Local Exchange Or Exchange Access Capability.

The Commission requested comment (Notice ¶ 90) "on the meaning of the requirement in section 251(c)(3) that ILECs provide unbundled network elements "in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service."²¹ Notice ¶ 90. The Commission also asks, "Specifically, may requesting carriers order and combine network elements to offer the same services an incumbent LEC offers for resale under subsection (c)(4)?" Notice ¶ 85.

Various ILECs have asserted that this statutory provision does not require them to provide a package of "unbundled network elements" that can be combined to provide a service. They argue that permitting this would effectively replace the provisions in section 251(c)(4) that require the ILECs to offer exchange service for resale at a wholesale price determined under a different cost standard than applies to unbundled network elements. They also suggest that the statutory requirement that they provide "access to network elements on an unbundled basis at any technically feasible point" compels the conclusion that the only way for another carrier to obtain access to a LEC's network at any given point is by interconnecting its own facilities to those of the incumbent. To do that, the carrier

²¹ 1996 Act, sec. 101, § 251(c)(3).

requesting access must be providing competing local telephone services and the facilities it interconnects with must be local exchange and exchange access facilities -- not interexchange facilities.²² The Department believes that the ILECs' construction of the statute would frustrate the competitive policies of the Act and create significant practical problems for the Commission. Section 251(c)(3) allows the requesting carrier to "combine" requested network elements to create exchange and exchange access services regardless of whether any of its own facilities are used in providing the service. Such a reading of the statute comports with Congress' desire to offer new entrants a variety of ways to enter local markets and does not eliminate the usefulness of the resale provisions of section 251(c)(4).

The Department believes that the use of unbundled elements under section 251(c)(3) is substantially different from the wholesale for resale service mandated by section 251(c)(4). One critical difference is that purchasers of unbundled elements under 251(c)(3) will, under our understanding of the Act, be able to participate fully in the provision of access services using those elements, while the opportunity to resell ILEC services under 251(c)(4) would be limited to services "provided at retail to subscribers who are not telecommunications carriers," that is, end user services. Thus, the ILEC proposals on this issue, as on others, would

²² See, *Promoting Facilities-Based Competition in All Markets: A Response to the Long Distance Incumbents*, Bell Atlantic Telephone Companies April 1996.

impede entry into the access market.²³

In addition, under the wholesale for resale option of section 251(c)(4), the reseller entrant is limited to the services being offered at retail to its customers. The new entrant would have little opportunity to differentiate the service offering from that provided by the ILEC or demand that the ILEC create new services it does not or has not offered to its customers. By contrast, an entrant that purchases "unbundled network elements" under section 251(c)(3) has more flexibility in creating differentiated local exchange/exchange access offerings; it is not bound by the offerings chosen by the ILEC.

Congress realized that many entrants would not be able to enter the market quickly with their own facilities. Therefore, it allowed them several means of entry -- resale, via access purchase, and facilities-based (partial or complete). Allowing entrants to start out by purchasing some or all of the unbundled elements allows them the flexibility to gradually introduce their own facilities into their networks while receiving from the ILEC only those features and functions that they are not able to provide themselves. This advantage will be a major factor in lowering the barriers to entry into the local market, and is thereby crucial to the steady development of competitive local markets in the manner envisioned by Congress.

²³ The Department also agrees with the Commission's suggestion (Notice ¶ 85) that since "251(c)(3) contemplates the purchase of unseparated facilities . . . a telecommunications carrier would not necessarily be purchasing the same services it would under section 251(c)(4)."

From this perspective, Congress was not inconsistent in permitting different modes of entry for carriers that need to obtain either facilities or services for resale from the ILECs. The different pricing standards for the unbundled elements and the wholesale for resale service merely reflect the different approaches. Where a service is purchased for resale, the retail price of the service is the rational starting place for determining the wholesale price.

In addition to being undesirable because of its adverse competitive effects, any rule that would require purchasers of elements to combine them with their own facilities would impose substantial administrative and enforcement burdens on regulators. The statutory interpretation urged by the ILECs does not provide any guidance as to the minimum amount of local facilities an entrant would have to own to qualify for section 251(c)(3) access, let alone support any conclusion that the interconnecting carrier would have to be predominantly facilities-based. If the Commission were to attempt to read such a requirement into the law it would create an extremely burdensome regulatory responsibility -- to determine which interconnectors qualified under a "minimum local facilities" test for access to the unbundled elements. Moreover, if there is no "minimum facilities test" that would exclude some significant competitors then the practical importance of the ILECs' argument is lost.²⁴

²⁴ The Department has heard arguments that the section should be read to require that an interconnector be required to have its own loops if it wants to use ILEC switching and *vice versa*. Under this interpretation if a competitive access provider had constructed a fiber ring connecting all the end offices in a city, it still would not be able to purchase unbundled loops and switching capacity even

C. Carriers Purchasing Interconnection and Access to Unbundled Network Elements Should Not Be Subject To Additional Access Charges.

The Department agrees with the Commission's tentative conclusion (Notice ¶¶ 164-165) that carriers obtaining unbundled network elements under section 251(c)(3) should pay the total cost of such elements on an unseparated basis (both interstate and intrastate), as required by section 252, and thus ILEC assessment of additional federal access charges would not be appropriate. We disagree with the ILEC argument that access to unbundled network elements at cost based prices under section 251(c)(3) should be limited to intrastate or local use and that access charges should continue to apply where such facilities are used for exchange access.

This argument of the ILECs, like others, would impede the ability of entrants to compete fully and on an equal footing in the provision of access.²⁵ The answer to this argument is simply that the language of section 251(c)(2) plainly contemplates use of the interconnection to be afforded for **exchange access as well as** local exchange service. The Act thus contemplates that the interconnection arrangements can be used to provide exchange access services in

though it would clearly have its own transport facilities for handling the local exchange calls. It is simply not possible to read such a requirement into the language of the statute.

²⁵ If Part 69 access charges were required in addition to the costs assessed under section 252, the interconnecting carrier would end up paying twice, while the ILEC would be twice compensated. Notice ¶ 165.

competition with the switched access services of the ILECs.²⁶

D. The Resale Obligations of Incumbent LECs

- 1. Section 251(c)(4) requires that incumbent LECs "must offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers".²⁷**

The Department believes that the availability of wholesale local exchange service for resale is crucial for the development of local competition and the

²⁶ Permitting the use of interconnection and access to unbundled elements for use in providing competitive exchange access is certainly not inconsistent with section 251(g) of the Act as some LECs have argued. That section only preserves the rights of interexchange carriers to equal access under the previously existing rules until the Commission issues superseding regulations. This section clearly is not intended to limit the scope or content of the superseding Commission regulations, or to limit the provision of exchange access by new entrants which the statute seeks to encourage.

²⁷ Section 251(c)(4) further requires incumbent LECs:

- (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
- (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

preservation of competition in interexchange markets. This requirement is also important to permit interexchange carriers to offer bundles of services comparable to what the ILECS can offer. The Commission should reject the suggestions that a wide variety of retail services should be subject to restrictions. Section 251(c)(4) provides but a single exception to the policy of unrestricted resale -- it permits a state commission "consistent with regulations prescribed by the Commission" to prohibit resellers from offering a service to a different category of customers than it is offered to at retail. The Department believes this exception should only be where a residential service can be shown to be priced below cost as a matter of regulatory policy.

2. The ILECs Should Not Be Allowed To Nullify the Resale Requirement By Offering Services As "Promotions" In Which Resellers Are Not Allowed To Participate.

The Commission solicits comments (Notice ¶ 175) on what effect excluding ILEC promotional services from the resale requirement would have on the ability of others to use resale as a mode of entry. If promotional plans are permitted that are not available to resellers, the ILECs could clearly use this exception as a means for nullifying or at least diluting the competitive significance of the resale requirement. A reseller of the ILECs' services will have only limited ways to distinguish the services it offers from those of the ILEC; therefore denying an entrant reseller an opportunity to participate in promotions may significantly

reduce its competitive effectiveness.

The statements of the ILECs that they would not be able to offer promotions if their resellers were able to participate is highly suspect. Presumably if the purpose of the promotions is to attract customers to new services (perhaps ISDN or CLASS services) or to win customers that might otherwise choose service from an alternative facilities-based local exchange carrier, the benefits to the ILEC from using promotional rates would not be diminished by permitting participation by resellers of its network. Denying resellers' access to promotional rates will allow the ILEC to distinguish the price of its service from the price of the reseller. But such price differentials, unless based on differences in marketing, billing, collection, or other costs specified in section 252(d)(3), are directly contrary to the intended operation of the resale provisions of the Act.

3. Permitting ILECs to Avoid the Resale Requirement by Withdrawing Retail Offerings Is Not Consistent With the Act.

The Department believes that, with one exception, ILECs should not be able to avoid the resale requirements by withdrawing any retail service offered at the time the 1996 Act was enacted. States should only have authority to approve such withdrawal requests where the purpose is a legitimate phase-out of an obsolete service; ILECs should not be allowed to use the withdrawal tactic to eliminate offerings that appear to provide an economical means for new entrants to become established in the local exchange markets.

It seems particularly clear that the Act by its terms would not permit an ILEC to refuse to permit the resale of a service that it has not completely withdrawn, but has merely "grandfathered" for its existing customers.²⁸ In such cases the ILEC is certainly continuing to provide the service, even though it may not be willing to extend the service to new customers or to add additional capacity.

VI. THE COMMISSION SHOULD WORK TO ENSURE THE DEVELOPMENT OF EXPLICIT AND COMPETITIVELY NEUTRAL POLICIES TO PROMOTE UNIVERSAL SERVICE AND OTHER SOCIAL GOALS, RATHER THAN DELAYING THE INTRODUCTION OF COMPETITION IN ORDER TO PRESERVE EXISTING BUT OBSOLETE MECHANISMS FOR ACHIEVING SUCH GOALS.

As we have emphasized throughout these Comments, the Commission should act boldly to protect the interests of consumers by adopting policies that will facilitate the rapid and effective entry of competing providers of local exchange and exchange access services. We recognize, as the Commission itself

²⁸ Already, following passage of the Telecommunications Act, one ILEC, U S West, has sought to withdraw its tariffed Centrex services throughout its fourteen-state region, while grandfathering existing customers but limiting expansion of their present usage. This was evidently done not because Centrex was unpopular or obsolete, but in an effort to avoid having to make Centrex services available for resale by third parties under the terms of the Act. Centrex services had been priced relatively low to deter bypass competition by large users, thus naturally making them attractive for resellers, who could make the service available to smaller users through aggregation, and so engage in bypass of U S West's higher-priced facilities and services. Withdrawal of Centrex took effect on notice in several of U S West's states, though complaints about this action now have been filed before many of the state commissions. Two state commissions in U S West's region, in Oregon and Minnesota, have rejected U S West's effort to withdraw Centrex, Oregon PUC Commissioner Joan Smith reportedly asking, "What turnip truck did they think we'd just fallen off of?" Wall Street Journal, Mar. 25, 1996, at B1.

has recognized, that the development of a competitive market will require the FCC and the states to adopt new approaches for promoting important social goals, including universal service. The regulatory policies designed to achieve such goals in a monopoly environment cannot function properly as we move to competition.

The is no incompatibility, however, between these goals and competition. Indeed, effective competition should allow such goals to be achieved at less cost to society, and the promotion of competition can therefore enhance our ability to achieve such goals. The transition to competition will, however, require new approaches designed for this new environment.

The rules that the Department of Justice is advocating in these comments will, we believe, significantly enhance the opportunities for competition to develop. In doing so, these rules will, of necessity, make it more difficult for ILECs to maintain prices above costs for many services, including interstate and intrastate access services. This change will lead to important benefits to consumers. Expanding the opportunities of entrants to compete profitably in the provision of access services will likely reduce the price of those services, resulting in lower prices for toll services. Moreover, because the provision of switched access service and the provision of switched local exchange service are provided through common facilities, expanding opportunities of entrants to profitably sell access services will likely increase competition in local exchange services, as well, with corresponding benefits to consumers of those services. We believe that such enhanced competition was a principal objective of the Telecommunications Act, and the

Commission should aggressively seek to implement that goal fully.

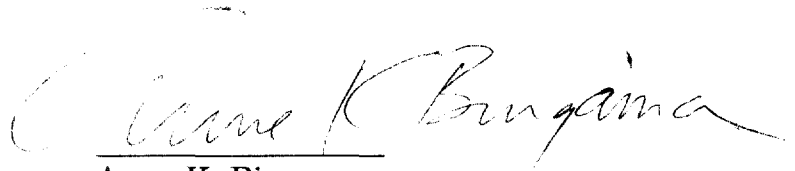
The Commission should also move promptly to complete reform of its interstate access regulatory regime, as well. The market-opening measures discussed here will, over time, drive access prices towards their true economic cost and erode ILEC revenue from access services. Thus, to the extent that this revenue contributes to subsidizing other services that regulators wish to continue to subsidize, alternative mechanisms will eventually be needed.

The speed with which the current access charge structure will be eroded is somewhat difficult to predict. Under the approach tentatively proposed by the Commission, the erosion of the ILECs' access charge revenues will be proportional to the success of new entrants in attracting customers for their local services. This proportionality arises from the Commission's tentative conclusion that entrants would be able to obtain interconnection at cost-based rates only for the purpose of providing, rather than receiving access. Thus, competitive pressure on access charges will likely not be significant until entrants begin to attract a sizable number of local customers. Regardless of the pace at which this occurs, however, the Commission should move rapidly, as it has recognized, to address the important issue of access charge reform.

In that context, and in the proceedings of the Joint Federal/State Board to consider universal service issue, the Commission and the States should seek new approaches for achieving universal service and other social goals that they consider to be important. There are a variety of mechanisms available for this

purpose that, in our view, can be structured to minimize economic distortions and operate in a competitively neutral manner. By combining such mechanisms with the benefits of competitive telecommunications markets, social goals may be achieved more completely, and at lower cost, than under the traditional regulated-monopoly model that was supplanted by the Telecommunications Act. Through judicious application of new approaches by the Commission and the states, the benefits of competition -- lower prices, technological innovation, and more efficient resource allocation -- will, in the end, make our telecommunications markets more accessible to all citizens.

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